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Developments in Evidence of Other Crimes

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DEVELOPMENTS IN EVIDENCE OF OTHER CRIMES

If the defendant in a criminal trial has a record of other offenses or is suspected of a number of crimes although charged with only one, the admissibility of evidence of these other offenses can be crucial. Admissibility depends in part on the purpose for which the evidence is offered. For instance, the prosecution is severely limited in its use of evidence of character. Until the defendant submits evidence of his good character, the subject cannot be raised[1] and even after character is put in issue particular acts are not allowed to show character.[2] The defendant's prior convictions may be used to impeach his testimony, just as similar evidence may be used to impeach any other witness.[3] These uses of other offenses to establish character or to impeach testimony are outside the scope of this article, which is concerned with evidence used in the prosecution's case in chief.

The central problem concerning evidence of other offenses is that if the defendant's other bad acts are proved, the jury might, wittingly or unwittingly, use bad character as an intermediate step in a series of deductions leading to the conclusion that the defendant should be convicted.[4] The evidence is excluded, "not because it has no appreciable probative value, but because it has too much."[5] One purpose of this article is to examine the meaning of that statement, the nature and validity of the assumptions underlying it, and the utility of the rules of evidence built on it.

A recent line of cases in Minnesota[6] and a single case in Louisiana[7]

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[1] 1 J. WIGMORE, EVIDENCE §§ 57-58 (3d ed. 1940).

[2] 1 J. WIGMORE, *supra* note 1, § 193; C. MCCORMICK, MCCORMICK ON EVIDENCE § 191 (2d ed. E. Cleary 1972). Defendant's character witnesses may be asked on cross-examination whether they have heard about certain other misdeeds of the defendant. Michelson v. United States, 335 U.S. 469 (1948).

[3] 3 J. WIGMORE, *supra* note 1, § 890. In some jurisdictions, *e.g.*, New York, there are limitations on the use of evidence of defendant's other crimes during cross-examination. *Id.* § 891.

[4] Dean Wigmore stated the problem thus:

> The impulse to argue from A's former bad deed or good deed directly to his doing or not doing of the bad deed charged is perhaps a natural one; but it will always be found, upon analysis of the process of reasoning, that there is involved in it a hidden intermediary step of some sort, resting on a second inference of character, motive, plan, or the like. This intermediate step is always implicit, and must be brought out.

1 J. WIGMORE, *supra* note 1, § 192.

[5] 1 J. WIGMORE, *supra* note 1, § 194.

[6] State v. Billstrom, 276 Minn. 174, N.W.2d 281 (1967); State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965).

[7] State v. Prieur, ___ La. ___, 277 So. 2d 126 (1973).

have established special procedures to be followed before and after evidence of other crimes is received. This article also examines these procedures and evaluates their effectiveness in coping with the problems presented by the admission of evidence of other offenses.

I. THE CURRENT STATE OF THE LAW: THEORY

Two rules have evolved to ensure that juries will not determine present guilt on the basis of character inferred from past acts. The exclusionary rule, presently followed in most American jurisdictions, excludes all evidence of other offenses unless it falls within stated exceptions.[8] The inclusionary rule,[9] followed in the remaining jurisdictions,[10] allows the admission of evidence of other crimes when it is relevant for any purpose other than demonstrating the defendant's character.[11]

A. The Exclusionary Rule

Generally, evidence of other offenses committed by the accused is excluded. There are five generally accepted exceptions to the rule: such evidence may be admitted for the purpose of proving motive;[12] intent;[13]

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[8] *E.g.*, Garner v. State, 269 Ala. 531, 114 So. 2d 385 (1959); State v. Curry, 97 Ariz. 191, 398 P.2d 899 (1965); Miller v. State, 239 Ark. 836, 394 S.W.2d 601 (1965); Clews v. People, 151 Colo. 219, 377 P.2d 125 (1962); Wooten v. United States, 285 A.2d 308 (D.C. App. 1971); Lyles v. State, 215 Ga. 229, 109 S.E.2d 785 (1959); State v. Hashimoto, 46 Haw. 183, 377 P.2d 728 (1962); People v. Walker, 34 Ill. 2d 23, 213 N.E.2d 552 (1966); Schweinefuss v. Commonwealth, 395 S.W.2d 370 (Ky. 1965); Cole v. State, 232 Md. 111, 194 A.2d 278 (1963), *cert. denied*, 375 U.S. 980 (1964); State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965); Riley v. State, 254 Miss. 86, 180 So. 2d 321 (1965); State v. Niehoff, 395 S.W.2d 174 (Mo. 1965); State v. Merritt, 138 Mont. 546, 357 P.2d 683 (1960); State v. Putnam, 178 Neb. 445, 133 N.W.2d 605 (1965); State v. Nystedt, 79 Nev. 24, 377 P.2d 929 (1963); State v. Sinnott, 24 N.J. 408, 132 A.2d 298 (1957); People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901); State v. Brown, 231 Ore. 297, 372 P.2d 779 (1962); Commonwealth v. Gockley, 411 Pa. 437, 192 A.2d 693 (1963); State v. Harris, 89 R.I. 202, 152 A.2d 106 (1959); State v. Brooks, 235 S.C. 344, 111 S.E.2d 686 (1959), *cert. denied*, 365 U.S. 300 (1961); Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963); Rees v. Commonwealth, 203 Va. 850, 127 S.E.2d 406 (1962); State v. Sayward, 63 Wash. 2d 485, 387 P.2d 746 (1963); State v. Lindsay, 77 Wyo. 410, 317 P.2d 506 (1957).

[9] *Cf.* Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938). Stone refers to the inclusionary rule as the "original" and the exclusionary rule as "spurious" in order to emphasize his view of the history of the two rules.

[10] *E.g.*, United States v. Woods, 484 F.2d 127 (4th Cir. 1973); People v. Woods, 35 Cal. 2d 504, 218 P.2d 981 (1950); State v. Jenkins, 158 Conn. 149, 256 A.2d 223 (1969); Williams v. State, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959); State v. Scott, 111 Utah 9, 175 P.2d 1016 (1947).

[11] *Cf.* MODEL CODE OF EVIDENCE rule 311 (1942).

[12] 1 F. WHARTON, WHARTON'S CRIMINAL EVIDENCE § 239 (12th ed. R. Anderson 1955).

[13] 1 F. WHARTON, *supra* note 12, § 237; 2 J. WIGMORE, *supra* note 1, §§ 302-03.

absence of mistake or accident;[14] existence of a common plan or scheme;[15] or the identity[16] of the actor.[17]

Intent, absence of mistake, and identity have been included as exceptions because they are elements of the crime charged and will be material whenever they are in issue.[18] The other purposes are included because they can serve as intermediate steps[19] in a chain of inference proceeding logically to the conclusion that the defendant is guilty. For example, a juror might use motive as an intermediate step, reasoning that because the defendant committed act A, his desire to conceal A probably led him to commit act B, the crime charged. If the other evidence in the case were consistent with the defendant's guilt, but failed to prove it conclusively or to explain why the defendant committed the crime, the proof of act A might remove a juror's reasonable doubt. If the other offense does not go to one of the excepted purposes,[20] it is excluded on the assumption that a juror could decide to convict only by injecting the defendant's character into the calculus: "Defendant committed offense A. Therefore he is a bad man. Consequently he probably committed offense B, for which he is on trial."[21] A second suspect use of character evidence is exemplified by the following line of reasoning: "Because defendant committed offense A, he is a bad man. Therefore, he should be sent to prison. Consequently I will find him guilty regardless of whether he committed offense B, for which he is on trial."[22] By forbidding the prosecutor

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[14] 1 F. WHARTON, *supra* note 12, § 236; 2 J. WIGMORE, *supra* note 1, §§ 302-03.

[15] 1 F. WHARTON, *supra* note 12, § 240; 2 J. WIGMORE, *supra* note 1, § 304.

[16] 1 F. WHARTON, *supra* note 12, § 235.

[17] The leading case employing this list is People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901). While some courts treat the relationship between the defendant and the victim as a sixth exception, *e.g.*, State v. Donohue, 2 N.J. 381, 67 A.2d 152 (1949), such an addition is not necessary, for if relevant at all, the relationship will tend to prove one of the other exceptions. For example, in a homicide case, the state can prove motive by establishing that the victim knew of the defendant's other crimes and was threatening to expose them, *e.g.*, State v. Boyce, 284 Minn. 242, 170 N.W.2d 104 (1969). In cases of sexual misconduct, particularly offenses like statutory rape or incest not involving force, a continuing sexual relationship with the victim could be considered a common plan or design.

Courts have historically been more willing to admit evidence of similar acts in cases involving sex offenses. Even where the prior acts are relevant only to the character of the accused, courts have accepted the idea that a showing of "sexual perversion" is more valuable than a showing of a tendency to commit some nonsexual crime. This practice has been sharply criticized. *See* Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212 (1965); Stone, *supra* note 9, at 1031.

[18] Stone, *supra* note 9, at 1026 n.190.

[19] *Id.*

[20] The essential difference between the exclusionary rule and the inclusionary rule is that the former treats this list as exhaustive rather than illustrative. *See* part I *B infra.*

[21] 1 F. WHARTON, *supra* note 12, § 232; 1 J. WIGMORE, *supra* note 1, § 194.

[22] 1 F. WHARTON, *supra* note 12, § 232; 1 J. WIGMORE, *supra* note 1, § 194.

to prove a defendant's character, the law seeks to prevent jurors from following either of these patterns.[23]

B. The Inclusionary Rule

Since the most common justification for the exclusionary rule is the need to keep out evidence of the defendant's character, seemingly the same purpose could be accomplished more directly by a test formulated in character terms. Such a test is employed in a minority of jurisdictions.[24] Under this test, commonly called the inclusionary rule, evidence of other offenses is admissible if it is relevant to any issue other than that of the defendant's character.[25]

II. THE CURRENT STATE OF THE LAW: APPLICATION

The two rules are not as different as their names would suggest, and, in most cases, they lead to the same result. Indeed, the contemporaneous existence of both rules created confusion during the first part of the twentieth century because judges and writers failed to distinguish them.[26]

A. United States v. Woods

There are, however, cases in which the difference between the rules can be decisive. The complicated facts of a recent Fourth Circuit case, *United States v. Woods*,[27] illustrate the differences in application between the two rules while indicating a trend toward acceptance of the inclusionary rule. The defendant was convicted of first degree murder for the death of her eight-month-old, pre-adoptive foster son, Paul. On five occasions between August 4, and August 20, 1969, the baby was taken to the hospital "gasping for breath and turning blue from lack of oxygen."[28] Four times he responded to artificial resuscitation, but the fifth time he went into a month-long coma and died. In none of the instances was the reason for the baby's difficulty discovered. Prior to his placement in Mrs. Woods' home at the age of five months, he was a "normal, healthy baby."[29]

A pathologist who examined Paul's medical history and performed an autopsy testified that he found no evidence of natural death or accident. He said he was 75 percent certain that Paul died of homicide by smothering. The pathologist's only doubt was attributed to the possibility of an unknown disease.

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[23] C. MCCORMICK, *supra* note 2, § 191; 1 J. WIGMORE, *supra* note 1, § 193.

[24] *See* note 10 *supra*.

[25] Williams v. State, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959); Day v. Commonwealth, 196 Va. 907, 86 S.E.2d 23 (1955).

[26] Stone, *supra* note 9, at 1034-37.

[27] 484 F.2d 127 (4th Cir. 1973).

[28] *Id.* at 129.

[29] *Id.*

To remove this doubt, the government showed that, over a period of twenty-five years, defendant had custody of, or access to, nine children who experienced at least twenty instances of cyanosis[30] among them. Six of the other children died, including defendant's three natural children and two she had adopted. The death certificates of the six children showed specific natural causes, including bronchiolitis, diphtheria, and asphyxiation due to mucous plug. Autopsies were performed in only two cases.[31] The government showed that three of the listed causes of death were medically impossible.[32]

Considering the admissibility of this evidence the court said:

> [W]ith regard to no single child was there any legally sufficient proof that defendant had done any act which the law forbids. Only when all of the evidence concerning the nine other children and Paul is considered collectively is the conclusion impelled that the probability that some or all of the other deaths [and] cyanotic seizures . . . were accidental or attributable to natural causes was so remote, the truth must be that Paul and some or all of the other children died at the hands of the defendant.[33]

If this evidence of a long pattern of unexplained similar incidents had been excluded, the defendant would almost surely have gone free; since the evidence was admitted, she was convicted.

The court's dictum to the contrary notwithstanding,[34] the case would be difficult to bring within any of the recognized exceptions to the exclusionary rule. The lack-of-accident exception is probably inappropriate because, as the court conceded,[35] it is ordinarily invoked only if the defendant admits the act but contends that either the act or the result was accidental.[36] Similarly, the identity exception is usually applied when a series of criminal acts are tied to the act with which defendant is charged by pervasive common features. *Woods* involved an extraordinary series of events, none of which could be shown to be unnatural standing alone, much less the criminal handiwork of the particular defendant. Thus, the evidence was used to show not just the identity of the *actor* but the existence of *acts*. To admit such evidence under the identity exception would stretch the exception to the breaking point.

The dissenting judge in *Woods* disputed the court's conclusion that these exceptions applied, but found it unnecessary to give detailed rea-

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[30] Cyanosis is a bluish discoloration due to deficient oxygenation of the blood.

[31] *Id.* at 143 n.10 (Widener, J., dissenting).

[32] *Id.* at 130-31. The dissenting judge objected that this evidence was of very doubtful competency because the events were remote in time, and the testifying physician had not examined, attended, or performed autopsies on any of the children. *Id.* at 143 n.10.

[33] *Id.* at 133.

[34] *Id.* at 134.

[35] *Id.*

[36] *See, e.g.*, People v. Molineux, 168 N.Y. 264, 300-05, 61 N.E. 286, 297-99 (1901).

sons.[37] The principal theory of the dissent was that the prosecution must show, as part of the *corpus delicti* of murder, that a criminal agency caused the death and that evidence of prior occurrences is not admissible to prove the *corpus delicti* even if an appropriate exception to the exclusionary rule exists.[38] This analysis seems unsatisfactory. If the defendant's intent is at issue, the state can show that death was not the result of an accident only by proving intent. Evidence of other crimes is freely admissible to prove intent which, in such a case, is necessary to prove that a crime has taken place.[39] The soundest basis for a dissent in *Woods* arguably would be the failure of the evidence to fit any of the recognized exceptions to the exclusionary rule.

The court did not rest its affirmance of Woods' conviction on the ground that the evidence satisfied an exception to the exclusionary rule however. Rather, it decided that evidence of other crimes should be admissible whenever such evidence is relevant for any purpose other than to show the defendant's propensity toward crime, unless, in the opinion of the trial judge, its probative value is outweighed by "a substantial danger of undue prejudice to the accused."[40] Thus, the court adopted the inclusionary rule.

The three cases[41] cited by the court to support its test of admissibility are inapposite. All of them concern identification testimony involving the use of photographs that might have given rise to an inference of prior difficulty with the law. Two of these cases[42] held that "mug shots" which had been identified by a witness were admissible. The third reached the same result with an ordinary snapshot, even though the same court had previously held "mug shots" inadmissible.[43]

More substantial federal authority for the *Woods* decision does exist, however. *United States v. Stirone*[44] was an extortion case in which the

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[37] 484 F.2d at 139 (Widener, J., dissenting).

[38] *Id.* at 142-44.

[39] While some authority supports Judge Widener's position, *e.g.*, Kahn v. State, 182 Ind. 1, 105 N.E. 385 (1914), there is no established rule to that effect. In People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901), the court reviewed a number of English homicide cases in which evidence of prior unexplained deaths was admitted and concluded:

> [T]he only two theories upon which the rulings therein . . . could be defended are, first, that the killing may have been accidental, or, second, that the cause of death was in doubt. In the one instance proof of other deaths in the same family, under similar circumstances . . . , may have been the only evidence obtainable to prove a felonious killing. . . .

Id. at 304, 61 N.E. at 298.

[40] 484 F.2d at 134.

[41] United States v. Hines, 470 F.2d 225 (3d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973); United States v. Hallman, 439 F.2d 603 (D.C. Cir. 1971); Dirring v. United States, 328 F.2d 512 (1st Cir.), *cert denied*, 377 U.S. 1003 (1964).

[42] United States v. Hines, 470 F.2d 225 (3d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973); Dirring v. United States, 328 F.2d 512 (1st Cir.), *cert. denied*, 377 U.S. 1003 (1964).

[43] United States v. Hallman, 439 F.2d 603 (D.C. Cir. 1971).

[44] 262 F.2d 571 (3d Cir. 1958), *rev'd on other grounds*, 361 U.S. 212 (1960).

defendant admitted receiving the payment in question, but testified that it was a legitimate commission. In rebuttal, the government introduced evidence of later extortions. The court thought the evidence relevant to explain the defendant's purpose or intent in soliciting the payment which was the subject of the indictment, but stated that admissibility should be governed by the inclusionary rule.[45] If the *Woods* court had chosen to uphold the exclusionary rule, *Stirone* would not have presented a major problem, since its statement of the inclusionary rule could have been dismissed as dictum. Nor would the cases actually cited[46] in *Woods* have been troublesome; not only are they distinguishable on their facts, but their bothersome language comes from *Stirone*.

B. The Federal Rules of Evidence

If the inclusionary rule was not the law in the federal courts before *Woods,* it probably soon will be because the proposed Federal Rules of Evidence adopt it. Under these rules, all relevant evidence is admissible,[47] subject to exclusion at the discretion of the court if its probative value is outweighed by the danger of prejudice.[48] Evidence of other crimes is not admissible to prove "the character of a person in order to show that he acted in conformity therewith."[49]

Both the *Woods* rule[50] and proposed Rule 403 allow the trial judge to exclude otherwise admissible evidence if its probative value is not sufficient to warrant the attendant risk of prejudice. This discretion presents a difficult problem for trial judges and appellate courts, since they must determine the limits of such discretion.

The facts of *Woods*[51] present an excellent illustration of the choice that courts must make. Under one view of the facts, the deaths and respiratory attacks may have all been accidental or natural. Even though, when the evidence is considered collectively, it becomes extremely unlikely that all of the incidents can be ascribed to accidental or natural causes, it does not follow that "the truth must be that *Paul and* some or all of the other children died at the hands of the defendant."[52] The italicized words make

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[45] 262 F.2d at 576-77. The court cited with approval Stone, *supra* note 9, and then ignored the thesis of that article, which emphasized the existence of two distinct rules, saying:

> So, the general rule, as stated by most courts, is [the exclusionary rule]. . . . [W]e think the rule may be stated a little less mechanically. Evidence of other offenses may be received if relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime.

Id. at 576.

[46] *See* note 41 *supra.*

[47] F.R. EVID. 402. The proposed Federal Rules of Evidence are set forth in the insert to 93 S. Ct. at 1-161 (1973).

[48] F.R. EVID. 403.

[49] F.R. EVID. 404(b).

[50] 484 F.2d at 134.

[51] United States v. Woods, 484 F.2d 127 (4th Cir. 1973). *See* part I *B supra.*

[52] 484 F.2d at 133 (emphasis added).

the statement a non sequitur. If "some or all" of the children died at the hands of the defendant, some of them may also have died of natural causes and Paul cannot be assigned to one group or the other solely on the basis of the pattern of seizures. If the defendant actually killed the six other children and Paul died of natural causes, she should have been acquitted since she was only on trial for Paul's death.

However, "all of the evidence" included the direct testimony about Paul by the examining pathologist;[53] he believed that Paul died by smothering. This opinion was corroborated by the evidence of similar deaths. Paul could have died of natural causes, but, as one learns more about the other children, it becomes increasingly difficult to believe that he did. The fact that Judges Winter and Field seem to have come rather close to confusing proof that Mrs. Woods killed some or all of the children with proof that she killed Paul lends weight to fears that jurors would be subject to the same sort of confusion. If there was no direct evidence that Paul's death was a homicide, a guilty verdict could only result from such confusion. In these circumstances, evidence of other incidents should never be admissible, because its probative value is simply not great enough to support a conviction. The greater the danger of jury confusion or willfully improper conviction (convicting the defendant of offense A to punish him for committing offense B), the more clearly the evidence should indicate the defendant's guilt in order to be admissible.

Careful empirical studies will be needed to determine what kinds of evidence are really prejudicial in given situations. Without such studies, courts' decisions will be founded on assumptions which, although based on the accumulated experience of judges and lawyers, have never been tested under controlled conditions.

C. The Exclusionary Rule in Practice

The problems arising under the exclusionary rule are somewhat different. Courts following it tend to substitute a pigeon-holing process for analysis of evidentiary relevance.[54] At times this process has even led to the admission of evidence which would have been inadmissible under the seemingly more permissive inclusionary rule.[55] Listing exceptions to the exclusionary rule is easy, but they are hard to apply. For example, in some poisoning cases,[56] in which a number of people in the same relation to defendant died under similar mysterious circumstances, it is difficult to fit the evidence relating to other deaths within any of the excepted categories; *i.e.*, there may be differing motives,[57] or intent may be inferred

[53] *Id.* at 130.

[54] *See* Stone, *supra* note 9, at 1011-33.

[55] *Id.* at 1031-33.

[56] *E.g.*, People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901); Farrer v. State, 2 Ohio St. 54 (1853).

[57] In *Molineux*, the motive in one case was jealousy, in the other, simple hatred. Even if all the poisonings were done, say, to inherit property, the rule could lead to confusion; if different property is involved, is it the same motive?

from the act. When two different people are killed for two different reasons, there can hardly be a common scheme or plan, but when there are similar reasons, *e.g.*, to collect life insurance, is there a single plan or two different ones? The further apart the two events are in time, the more difficult the question becomes. The most likely category is the identity of the perpetrator, but even this classification sometimes fails because of a narrow reading of the exception.[58] This narrow construction can result in the exclusion of genuinely relevant evidence.[59] The source of judicial difficulties with the rule would seem to be the rule itself.

III. THE CHOICE OF THE BEST RULE

Although the exclusionary and inclusionary rules sometimes lead to different results, they have a common purpose. It is important, therefore, to consider which rule better achieves that purpose. Certain assumptions are common to both rules. They are predicated on the notion that the jury is likely to be prejudiced by evidence of the defendant's prior misdeeds, but the danger of prejudice is outweighed by other considerations when the other acts tend to establish an element of the presently charged crime.

A. Prejudice as Increased Probability of an Unfavorable Verdict

The term "prejudice" is itself confusing; some courts use the word as a synonym for an increased probability of an unfavorable verdict and admit "prejudicial" evidence.[60] A recent study by the London School of Economics Jury Project[61] indicates that evidence of other crimes is prejudi-

[58] In *Molineux*, Mrs. Adams died from poison accidentally administered to her by Cornish, who had received the poison in an anonymously sent box of Bromo-Seltzer. It was proved that the defendant had rented a letter box in the name of Cornish. The questioned evidence was that the defendant had previously taken a letter box in the name of Barnet, that Barnet had died from the same poison mixed in a box of "Kutnow," a remedy for impotence, and that defendant had used the letter box to order "Kutnow." The court held that this evidence was outside the identity exception because "none of the letters in the one series . . . throw any light upon the matters referred to in the other. . . ." People v. Molineux, 168 N.Y. 264, 317, 61 N.E. 286, 303 (1901). A more liberal interpretation of the identity exception would be that "the facts and circumstances of the Barnet case and the Cornish case were of such a character that they must necessarily have resulted from the action of a single mind." 168 N.Y. at 348, 61 N.E. at 315 (Parker, C.J., dissenting).

[59] Referring again to *Molineux*, the evidence about the Barnet letter box was relevant to explain the one unexplained fact in the chain of circumstantial evidence tying the defendant to Mrs. Adams' death. Stone, *supra* note 9, at 1028-29.

[60] The following language is typical: "The fact that evidence is prejudicial does not make it incompetent. All the evidence which plaintiff introduced to make out a case was necessarily prejudicial." Ingram v. Prairie Block Coal Co., 319 Mo. 644, 656, 5 S.W.2d 413, 418 (1928).

[61] London School of Economics Jury Project, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. (Eng.) 208 [hereinafter cited as L.S.E. Study]. The study used groups of jurors who listened to tape recordings reenacted from transcripts of actual trials. The content of the trials was varied to allow measurement of the effect of the vari-

cial in this sense. The experimenters employed two basic cases, a theft and a rape, and varied the evidence admitted. The likelihood of conviction increased by a statistically significant margin when evidence of *similar* offenses was introduced, but no increase was observed when evidence of *dissimilar* offenses was admitted. For example, when evidence of a prior conviction for indecency was admitted in the theft case, the increase in convictions was insignificant.[62] In the rape case, the introduction of evidence of a prior conviction for "dishonesty" was associated with a significant *decrease* in votes for conviction.[63] The findings cast doubt on the "bad man" hypothesis, for if the jurors believed that a defendant's guilt could be established by proof that he was a criminal, there would have been more guilty verdicts even when dissimilar crimes were proven. It is possible, however, that the jurors followed a slightly more sophisticated version of the "bad man" pattern,[64] reasoning that the defendant was a sex offender or a thief rather than simply a bad man.

In other parts of the same study, seemingly illogical verdicts suggest the existence of prejudice. For example, in the rape case, evidence that one defendant had been previously convicted of indecent assaults produced a significant increase in guilty verdicts against his codefendant as well as against him,[65] and evidence of a dissimilar crime produced an actual decrease in convictions.[66]

While the London School of Economics Study indicated that juries do take evidence of other offenses into account in some circumstances and

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ations on the jurors. The individual jurors' votes were recorded before and after deliberations, and the deliberations were observed. Although the jurors were aware that they were not deciding the fate of a real defendant, the study found them "deeply immersed, entirely serious, often vehemently argumentative, to all appearances entirely oblivious that the situation was only an experiment." *Id.* at 210.

[62] *Id.* at 217, 222.

[63] *Id.* at 218. This effect even operated in favor of a codefendant of the defendant whose record was admitted.

[64] *See* text accompanying note 26 *supra*.

[65] L.S.E. Study, *supra* note 61, at 218. In the case of the defendant without a prior record, the number of convictions for attempted rape was much higher than those for rape, an effect described as "guilt by association . . . tempered by compromise." *Id.* The guilt by association, if not the compromise, may be less irrational than it originally appears. Defendant A's prior criminal record may reinforce the victim's testimony, making what she says about defendant B more credible as well. It may well be that this effect should still be considered prejudicial, especially since the evidence shows only that A has a tendency to commit sexual assaults, apparently of a less extreme nature than rape.

[66] *See* notes 34-35 and accompanying text *supra*. Although nothing in the jurors' discussions accounts for this phenomenon, the authors ascribe it to a feeling that it was unfair to introduce such "prejudicial, marginally relevant evidence." L.S.E. Study, *supra* note 61, at 218. Another possible explanation is that the jurors believed the prosecutor thought his case was weak and, therefore, concluded that the case must in fact have been weak. While the exclusionary rule was formulated to prevent prejudice against the defendant, the existence of a prodefendant prejudice would indicate that jurors' decisions are not always based on rational deductions from the evidence presented at trial, thereby lending support to the arguments for exclusion. Prejudice in either direction is troubling to anyone who hopes that every guilty defendant is convicted and every innocent one goes free.

that such cognizance increases convictions, it did not establish that such evidence causes more *wrongful* convictions. This suggests that another usage of the word prejudice would be more appropriate in the context of admitting evidence of other crimes.

B. Prejudice as Increased Probability of a Verdict Contrary to Fact

Some courts use the word prejudice only in reference to evidence that may lead the jury to a decision contrary to fact.[67] Accepting this concept of prejudice, it becomes harder to test experimentally the hypothesis that evidence of other crimes is prejudicial to the defendant. A mock trial can easily be presented to two groups of jurors, deleting evidence of other crimes for one group and not the other, but the results would indicate only whether the evidence increases the probability of conviction, not whether the increase in convictions was in any sense improper. If it could be empirically proved that juries hearing evidence of other crimes will convict more guilty defendants, but not more innocent ones, than juries lacking such knowledge, then arguably the criminal justice system would be improved by discarding both the inclusionary and exclusionary rules and allowing the free admission of such evidence. But the rule that evidence of other misconduct may not be received if it is relevant only to demonstrate the bad character of the defendant is deeply ingrained in our law.[68] It is hard to imagine how one could amass proof of the rule's worthlessness which would be so convincing as to induce an appropriate forum to discard it.

It is apparent, then, that empirical research into the jury's ability to handle character evidence without prejudice is unlikely to result in changes in courtroom practice. More information is needed, however, about the ways in which evidence of various kinds of other crimes, introduced for permissible purposes at trial, affects jury behavior. The exclusionary rule in its common form is preferable to the inclusionary rule if evidence admitted because of one of the exceptions is less likely to cause prejudice[69] than evidence outside the exceptions but still relevant to an issue in the case. For example, it is often said that, under the exclusionary rule, evidence of other crimes is not admissible to prove the *corpus delicti*.[70] This rule should be discarded unless it conforms to a real difference between the prejudicial effect of evidence proving the *corpus delicti* and that of evidence falling within any of the standard exceptions. Only careful study can determine whether the rule conforms to reality or

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[67] *E.g.*, State v. Thornton, 108 Ariz. 119, 121, 493 P.2d 902, 904 (1972); State v. Peke, 70 N.M. 108, 114, 371 P.2d 226, 230 (1962); Sonker-Galamba Corp. v. Hilman 111 S.W.2d 853, 856 (Tex. Civ. App. 1937).

[68] *See* Michelson v. United States, 335 U.S. 469, 475-76 (1948).

[69] It should be kept in mind that "prejudice" as used herein means a danger of a *wrongly* unfavorable verdict. *See* note 67 and accompanying text *supra*. Thus, a higher probative value would be reflected as diminished prejudice.

[70] *See* notes 38-39 and accompanying text *supra*.

not. Research may also help answer other questions about the exclusionary rule, such as whether other crimes should be admissible to prove intent only when the commission of the act is not in issue and the act is not one which by its nature implies intent. The list of exceptions could be expanded, contracted, or simply replaced by the inclusionary rule on the basis of the experimental results.

In the absence of such knowledge, the inclusionary rule seems to be the most rational approach available. The rule is simpler and should not cause a significant increase in admission of prejudicial evidence.

IV. PROCEDURAL SAFEGUARDS

The effort to strike a proper balance between prejudice and proof of guilt has recently taken a new turn in Minnesota and Louisiana. Because the substantive rules of evidence were found inadequate to deal with the problems created by evidence of other crimes, the courts in these two states have created procedural safeguards that act as an additional barrier to the admission of such evidence. The Minnesota cases will be considered first because that state has the longer experience with the new rules.

A. Minnesota

The leading Minnesota case is *State v. Spreigl*,[71] in which the court held that the prosecution must give notice of its intention to prove other offenses within a reasonable time before trial.[72] The notice must specify what other offenses will be proved, "described with the particularity required of an indictment or information."[73] Three classes of other offenses are excepted from this requirement: those which are part of the same immediate episode as the offense charged; those for which the defendant was previously prosecuted; and those introduced to rebut the defendant's evidence of good character.[74] Clearly the main problem addressed by this decision is the element of surprise. Even where the defendant's prior misconduct is unquestionably relevant, he should have an ample opportunity to dispute the truth of the prosecution's evidence on the subject. The first two exceptions, therefore, are quite sensible; they are matters of which defense counsel should be aware without notice from the state. Evidence introduced to rebut the defendant's evidence of good character is somewhat different. The prosecutor cannot know in advance whether the defendant will introduce evidence of his good character. It seems unfair to allow the defendant to condition his calling of character witnesses upon knowledge of how much evidence the prosecution is prepared to use in rebuttal. This exception may reflect a tendency to view the trial as a sporting proposition; the defendant can raise the issue of his character,

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[71] 272 Minn. 488, 139 N.W.2d 167 (1965).
[72] 272 Minn. at 496-97, 139 N.W.2d at 173.
[73] 272 Minn. at 497, 139 N.W.2d at 173.
[74] *Id.*

but only if he is willing to take his chances on the strength of the prosecution's rebuttal evidence.

Some fifteen months after *Spreigl,* the Minnesota court again dealt with evidence of other offenses, this time setting forth procedures to be followed during the trial. In *State v. Billstrom*[75] the defendant was convicted of the armed robbery of a St. Paul bar. Over objections, witnesses were allowed to identify defendant in connection with a similar robbery and an attempted robbery, both of which occurred within a two-week period in the same general area as the robbery charged. Since Minnesota follows the exclusionary rule,[76] the issue on appeal was whether the disputed evidence came within any of the recognized exceptions. Although the briefs concentrated on the "common plan or scheme" exception, the court brushed that issue aside and affirmed, finding the evidence admissible to establish identity.[77] The court seized the opportunity to expand the procedural safeguards delineated in *Spreigl.*

In addition to the pretrial notice required by *Spreigl,* the court required the prosecution to specify the applicable exception to the exclusionary rule at the time the evidence is offered.[78] If the evidence is received for the purpose of identity, there must be "some relationship in time, location or modus operandi between the crime charged and the other offenses,"[79] and even then the trial court must find that the evidence of defendant's identity is "otherwise weak or inadequate,"[80] making evidence of other crimes "necessary to support the state's burden of proof."[81]

The evidence of defendant's participation in the other crimes must be clear and convincing.[82] The jury should be admonished as to the limited purpose of the evidence both at the time of its admission and in the final charge:

> It is the court's duty to advise the jury in unequivocal language that defendant is not being tried and may not be convicted for any offense except that charged, warning them that to convict for other offenses may result in unjust double punishment.[83]

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[75] 276 Minn. 174, 149 N.W.2d 281 (1967).

[76] 276 Minn. at 176-77, 149 N.W.2d at 283.

[77] 276 Minn. at 176, 149 N.W.2d at 283.

[78] 276 Minn. at 178, 149 N.W.2d at 284. The court cited Stanmore v. People, 146 Colo. 445, 362 P.2d 1042 (1961); this rule has existed in Colorado since Jaynes v. People, 44 Colo. 535, 99 P. 325 (1908).

[79] 276 Minn. at 178, 149 N.W.2d at 284.

[80] *Id.*

[81] 276 Minn. at 178-79, 149 N.W.2d at 284; *cf.* F.R. EVID. 403. In the *Billstrom* case itself, the latter requirement was apparently satisfied because the defense used alibi witnesses to dispute the identifications by the bar owner and an employee who left shortly before the robbery.

[82] 276 Minn. at 179, 149 N.W.2d at 285.

[83] *Id.* Although this seems to be the Minnesota court's first statement on limiting instructions, similar rules were well established in a number of other jurisdictions. Baker v. United States, 310 F.2d 924 (9th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963); State v. Finley, 85 Ariz. 327, 338 P.2d 790 (1959); People v. Shockey, 66 Ill. App. 2d 245, 213 N.E.2d 107, *cert. denied,* 385 U.S. 887 (1966); People v. Manchester, 235 Mich. 594, 209 N.W. 815 (1926).

Subsequent cases have partially undercut these guidelines. In *State v. Houge*,[84] the defendant had been arraigned on a forgery charge forty days before his trial, but the *Spreigl* notice pertaining to a second forgery incident was served only one day before trial. The court acknowledged that such unnecessarily tardy notice was not good practice, but affirmed the conviction, because "the state's eleventh-hour filing, even if erroneous, did not in this case constitute prejudicial error."[85] The rest of the state's case was so convincing that it was "hardly conceivable that the *cumulative* evidence relating to the Charles Jewelry check could have had decisive impact on the trial court's determination."[86] Thus, in almost the same breath, the court drastically limited the *Spreigl* requirement of notice a reasonable time before trial and the *Billstrom* prohibition of cumulative evidence.[87]

If *Houge* left any doubt about the limited scope of the rule against cumulative evidence, *State v. Whelan*[88] removed it. In a trial for sexual intercourse with a child, the victim's mother was allowed to testify that "She said it happened three times."[89] The court held that it was error to allow this testimony, resting its holding upon *Spreigl*.[90] But for *Spreigl*, the evidence would have been admitted because other acts of sexual misconduct with the same victim are admissible in Minnesota.[91] Once again, the court affirmed the conviction because the error was not prejudicial,[92] and disdained even a nod at *Billstrom*. To the assertion that there was ample evidence to convict without the erroneous testimony,[93] the court added three makeweight arguments: the prosecutor had not pursued the objectionable answer in his examination of the witness; he had not referred to it in final argument; and the court had given a limiting instruction.[94] The first two are of dubious relevance, while *both* a limiting instruction *and* a finding of necessity are required under *Billstrom*. Thus, the safeguards announced in *Billstrom* have been strictly limited to cases in

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[84] 280 Minn. 372, 158 N.W.2d 265 (1968).

[85] 280 Minn. at 376, 159 N.W.2d at 268.

[86] 280 Minn. at 377, 159 N.W.2d at 268 (emphasis added).

[87] Concededly, this case was tried before the supreme court's decision in *Billstrom*, which was prospective in its application. Still, the court's failure to give even a cursory glance at its holding in *Billstrom* is shocking, and this failure is not limited to cases tried before *Billstrom*. *See* text at notes 97-103 *infra*.

[88] 291 Minn. 83, 189 N.W.2d 170 (1971).

[89] 291 Minn. at 88, 189 N.W.2d at 174.

[90] 291 Minn. at 90, 189 N.W.2d at 175.

[91] 291 Minn. at 89-90, 189 N.W.2d at 175.

[92] 291 Minn. at 90-91, 189 N.W.2d at 175-76.

[93] This seems somewhat questionable since the victim was apparently retarded, the corroborating evidence came from her ten-year-old sister, and the court refused to order a deposition from a witness, then in Vietnam, who was prepared to testify that the same child had previously made false accusations of a similar nature against him. 291 Minn. at 85-87, 189 N.W.2d at 173.

[94] 291 Minn. at 90-91, 189 N.W.2d at 175-76. There is no indication in the opinion that a similar instruction was given at the time of the testimony as required under *Billstrom*.

which the evidence is admitted under the identity exception,[95] even though the reasons for the safeguards seem generally applicable to evidence of other crimes.

Another inroad on *Spreigl* was the decision in *State v. Boyce*.[96] The court found, in this homicide case, that evidence of other crimes was not subject to the notice requirement if it bore directly on the prior relationship of the victim to the accused. Although this is not one of the kinds of other offenses which *Spreigl* expressly excluded from its coverage,[97] the rationale was similar:

> We are certain that this defendant was aware, as he had reason to be, that his prior relationship with the decedent, particularly in so far as it involved ill will or quarrels, would be presented by the state as a part of its case against him.[98]

This holding was enlarged in *State v. Martin*,[99] which allowed evidence of robberies in a first-degree murder prosecution without a *Spreigl* notice. The robberies had a bearing on the relationship between the accused and the victim because the alleged motive for the killing was fear that the victim would report the robberies.[100] By ignoring the word "directly" in its prior holding, the court leaped from direct evidence of ill will between defendant and victim to secondary evidence from which the relationship had to be inferred.

B. Louisiana

Louisiana's statutes refer to the admissibility of evidence of similar acts only for the purpose of showing intent and knowledge;[101] evidentiary treatment of dissimilar offenses is not specified by statute. The Louisiana courts seem to have adopted the exclusionary rule with the standard set of exceptions.[102] There is, however, some uncertainty over the treatment of exceptions not specifically mentioned in the Code. In *State v. Prieur*,[103] the defendant was convicted of the armed robbery of a bus driver. Evidence of two other armed robberies was admitted. In one of these incidents, the victim was driving a city bus, as in the crime for which defendant was tried. The other robbery took place at a service station. The court held evidence of the service station robbery inadmissible and reversed.[104]

The court reserved judgment on the admissibility of the earlier bus

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[95] *Billstrom's* test of necessity still has life for cases under the identity exception. State v. Maternowski, ___ Minn. ___, 209 N.W.2d 686, 687 (1973).

[96] 284 Minn. 242, 170 N.W.2d 104 (1969).

[97] *See* note 83 and accompanying text *supra*.

[98] 284 Minn. at 260. 170 N.W.2d at 115.

[99] 293 Minn. 116, 197 N.W.2d 219 (1972).

[100] 293 Minn. at 128-29, 197 N.W.2d at 226-27.

[101] LA. REV. STAT. §§ 15:445-46 (1967).

[102] State v. Reinhardt, 229 La. 673, 86 So. 2d 530 (1956).

[103] ___ La. ___, 277 So. 2d 126 (1973).

[104] *Id.* at 129.

robbery,[105] but promulgated a set of rules similar to those in *Spreigl* and *Billstrom,* establishing prerequisites to the admission of any evidence of other crimes. A pretrial notice describing the other act or offense "with the general particularity required of an indictment or information"[106] is required, although acts that are part of the *res gestae* and convictions which are used to impeach defendant's testimony are excepted from this requirement.[107] The notice must contain a statement of the relevant exception;[108] the state must show that the proffered evidence is not cumulative;[109] and the trial court must instruct the jury as to the limited purpose of the evidence, both at the time it is received, if requested by the defense, and in the judge's final charge to the jury.[110]

Although there are several differences between the details of these rules and those promulgated in *Spreigl* and *Billstrom,* only one is troublesome: the requirement that the state specify in its pretrial notice the relevant exception to the exclusionary rule. This requirement raises the possibility that convictions will be reversed because the prosecution picked the wrong exception. Considering the uncertain boundaries between the exceptions, this possibility is very real. To avoid the necessity of relitigating many cases, courts may allow the differences between the exceptions to become even more confused in order to affirm more convictions. Another approach might be to allow the state to "specify" every exception which could arguably apply and then to permit the conviction to stand as long as one of them is valid. This course, however, would seem to defeat the purpose of the rule.

C. The Impact of the Minnesota and Louisiana Rules

Spreigl is now more than eight years old, and it has had no revolutionary impact. The pretrial notice requirement has been called a "salutary condition,"[111] but only Louisiana has adopted it. The idea has been proposed to the Wisconsin court twice and has been rejected twice.[112] A notice rule has also been turned down by the Eighth Circuit, which said that the need for uniformity in the federal courts outweighed any benefit that might flow from the rule.[113] No doubt a major reason for this cool reception is the fear that any notice requirement will place impossible burdens on prosecutors.

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105 *Id.*
106 *Id.* at 130.
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.*
111 1 J. WIGMORE, *supra* note 1, § 194d (Supp. 1972).
112 Cheney v. State, 44 Wis. 2d 454, 171 N.W.2d 339 (1969); Whitty v. State, 34 Wis. 2d 278, 149 N.W.2d 557 (1967).
113 McConkey v. United States, 444 F.2d 788 (8th Cir.), *cert. denied,* 404 U.S. 885 (1971).

> Criminal justice is overburdened in our society. The addition of these five innovative requirements can only hamper and further encumber the criminal dockets of our courts. More evidentiary hearings prior to trial, more delays in the actual conduct of the trial and more grounds for technical error will be the inevitable result of this decision.[114]

These objections seem to have some support, albeit less than unanimous, among prosecutors themselves.[115] Another objection that has been raised[116] is the difficulty of specifying the other crime with sufficient particularity[117] in certain cases, such as those involving stolen property and child molestation.

Another important problem with these rules is the diminished predictability of the trial courts' evidentiary rulings. Because the admissibility of certain evidence often determines the case's outcome, any uncertainty in rulings makes it harder for prosecutors to decide whether or not to bring charges.[118] Since the decision to prosecute is an important watershed in the criminal justice process, such uncertainties could have important implications for the process as a whole. Because of their limited resources, most prosecutors prefer to charge only when they are reasonably certain of a conviction. Given the small number of cases that go to trial, an effect at this pretrial stage may be more important than one at the trial stage.

These notice rules also result in a number of inefficiencies. It is unclear, however, whether the inefficiencies are balanced by benefits of other kinds. For example, an occasional delay for an evidentiary hearing[119] may be a price the system should be willing to pay to ensure fairer trials. Not until it is known how much prejudice is really caused by evidence of other crimes can one be sure whether delays at and before trial should be countenanced in order to keep such evidence away from the jury. Thus,

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[114] State v. Prieur, ___ La. ___, 277 So. 2d 126, 134 (1973) (Summers, J., dissenting).

[115] Two sets of short questionnaires were sent to prosecutors. One set went to seven District Attorneys in Louisiana, four of whom responded; the others went to ten County Attorneys in Minnesota of whom five responded. Responses on file with the *University of Michigan Journal of Law Reform*. No scientific sampling techniques were used to select the recipients in either state, but both urban and rural areas were represented. All of the Louisiana respondents agreed with Justice Summers' prediction. Moreover, three of the four thought that *Prieur* would have an adverse effect on the quality of criminal justice. The other expected the administration of justice to be slowed, but foresaw no other significant effect. By comparison, only one of the Minnesota prosecutors thought the *Spreigl* and its progeny had caused a deterioration in the quality of criminal justice, while two said there had been an improvement, and two saw no difference. The one pessimistic response may, however, be entitled to extra weight because it came from Ramsey County (St. Paul).

[116] Questionnaire response of Ramsey County, Minnesota, Attorney to author, on file with the *University of Michigan Journal of Law Reform*.

[117] *See* note 73 and accompanying text *supra*.

[118] Questionnaire response of Ramsey County, Minnesota, Attorney to author, on file with the *University of Michigan Journal of Law Reform*.

[119] *See* note 114 and accompanying text *supra*.

empirical studies of the prejudicial effects of evidence of other crimes are essential to a sound evaluation of the rules concerning its admission.

V. CONCLUSION

The assumptions underlying the exclusionary rule have never been adequately tested. Although experiments to test jury prejudice are difficult to design, it should be possible to find one or more that would tell much more than is now known about the need to exclude evidence of other offenses. Without such knowledge, it is difficult to tell whether it is wiser to surround the exclusionary rule with greater procedural safeguards, as in Minnesota and Louisiana, or to discard it entirely in favor of the inclusionary rule, as in *Woods*.

Absent more detailed knowledge, the inclusionary rule is more self-consistent and less confusing than the exclusionary rule, without being likely to precipitate unfair convictions.

At the same time, some of the safeguards established in *Spreigl* and its progeny are useful regardless of the form of the evidentiary rule. The defendant should have ample opportunity to refute testimony about his other offenses because false evidence would surely be prejudicial under any understanding of that word. The fact that other offenses do not have to be proved beyond a reasonable doubt makes a false accusation of another offense all the more dangerous. Pretrial notice gives the defense an opportunity to refute this evidence. For a similar reason, pretrial notice of the prosecution's legal ground for seeking to admit evidence of other crimes would seem to be good practice. As this rule exists in Louisiana, it calls for a statement of the applicable exception to the exclusionary rule, but the same purpose could be served in jurisdictions following the inclusionary rule by requiring a brief statement of the prosecutor's reason for believing that the evidence is relevant. If applied too rigorously, this specific notice rule could revive the hazards of the common-law forms of action;[120] applied with good sense, it could move the evidentiary arguments, which would otherwise be made during trial, to a pretrial phase, and it could mean that counsel would be better prepared for them. Limiting instructions to the jury are quite widely accepted. They are readily separable from notice guidelines and could profitably be given everywhere.

—*Nickolas J. Kyser*

[120] *See* J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE 288-93 (1968) quoting excerpts from F. MAITLAND, EQUITY ALSO FORMS OF ACTION AT COMMON LAW (1st ed. 1909).